

Omari (Migration) [2021] AATA 2422 (24 June 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Hanah Omari
VISA APPLICANT:	Mr Ahmad El Masri
CASE NUMBER:	1808309
DIBP REFERENCE(S):	BCC2017/1725341
MEMBER:	Russell Matheson
DATE:	24 June 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309. 211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 24 June 2021 at 4:19pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – validly married – significant financial support and visits to applicant’s home country – social activities when together and communication when separated – photos and statutory declarations from relatives and friends – genuine, plausible and persuasive evidence – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 19 March 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant (the applicant) is a male national of Lebanon born in March 1989. He applied for the visa on 15 May 2017 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the applicant is the spouse of the sponsor.
4. The review applicant (the sponsor) appeared before the Tribunal on 23 June 2021 to give evidence and present arguments. The Tribunal also received oral evidence from three witnesses Mr D (the sponsors half-brother), Ms A (the sponsors sister-in-law) and Mrs I (the sponsors sister-in-law).
5. The review applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

7. Background

8. The applicant is 32 years old and is from Bebnine, Lebanon. He is currently working in his brother's car wash business. He claimed that he has not been in a relationship prior to his marriage to the sponsor. The applicant was granted a sponsored family visitor visa on 8 June 2012, after his visitor visa expired in Australia, he stayed on several Bridging E visas, he later applied for a protection visa which was refused on 18 January 2013. He applied for an RRT review on 31 January 2013 and the RRT affirmed the refusal on 27 August 2014. The applicant applied for Ministerial Intervention on 19 September 2014 and on 10 October 2014 the Minister did not consider the applicant's application. He was refused three requests to waive the 8503 condition on 30 December 2014, 10 February 2015 and on 28 May 2015. He lodged an invalid Medical Treatment visa on 12 May 2015. Meanwhile, he was granted several Bridging E visas until it was refused on 9 February 2016 and the applicant was asked to leave Australia. He claims to have had a car accident on the day he was leaving and did not depart on the assigned date. He was detained and deported on 10 March 2016. A one-year exclusion period applied, and the applicant's UF309 visa application which was lodged in Beirut was refused on 27 January 2017. The applicant lives with his parents and siblings in Lebanon. He has one brother in Australia.
9. The sponsor is 29 years old. She was born in Westmead, NSW Australia. In the application form, it has been declared that the sponsor has never been previously married or in a de facto relationship. The sponsor is currently employed as a receptionist in a medical centre. She currently lives with her parents and siblings.

10. It is claimed in the application that the applicant was introduced to the sponsor through family friends in Australia. They first met in person on 10 May 2013 and instantly liked each other. They committed to a shared life on 2 June 2013, and they got engaged on 6 July 2013. They got married religiously on 12 July 2013 and celebrated their wedding on 7 December 2013.
11. After the applicant was deported from Australia on 10 March 2016, the sponsor travelled to Lebanon from 29 March 2016 and returned on 20 May 2016. The sponsor has since travelled to Lebanon to visit the applicant from 31 March 2018 to 11 May 2018 and from 8 October 2019 to 5 November 2019.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
13. The Tribunal has before it the Departmental file relating to the applicant, its own file, and a copy of the Department's decision provided by the sponsor to the Tribunal.
14. The evidence the parties provided to the Tribunal is recorded throughout this decision record. _

Whether the parties are in a spouse or de facto relationship

15. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961*, indicating the parties were married on 12 July 2013 in Greenacre, NSW. There is no evidence before the Tribunal to indicate the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
18. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the

relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.

19. The Tribunal had the benefit of the sponsor's oral evidence. The Tribunal gave all the evidence provided by the sponsor and the three witnesses at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal considered evidence given by the sponsor and the witnesses to be persuasive and overall credible.

Are the other requirements for a spouse relationship met?

20. *Financial aspects*

21. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
22. The applicant provided twelve money transfer receipts which show that a total of \$3,852 has been sent from the sponsor to the applicant between July 2017 and April 2021. Whilst this indicates that the sponsor provided some support to the applicant, the Tribunal does not find that the money transfers in and of itself constitute compelling evidence that the applicant and the sponsor have in any way pooled financial resources.
23. The parties gave evidence that they share their financial resources when the sponsor visits the applicant in Lebanon. The sponsor claims that she had savings from her employment as a receptionist in Australia which she took with her to Lebanon in 2018 and 2019 and this money was used for the couple's daily living expenses. She further stated that the economy in Lebanon has collapsed and the applicant earns very little money working as a car wash attendant in his brother's business in Lebanon. The applicant stated that the parties share and pool their financial resources when they are together. At the hearing the sponsor and applicant had a sound knowledge of each other's employment status, financial situation and future financial commitments. The parties and three witnesses gave evidence the couple leased a premise at Liverpool before the applicant returned to Lebanon for approximately 18 months and the lease was in the sponsor's brother's name (now deceased) because of the applicant's visa status and they had limited financial resources. The applicant provided a copy of a Lumo Energy electricity bill in the applicant's name for the Liverpool address for the period 22 May 2015 to 21 August 2015. The sponsor provided copies of her payslips addressed to her at the Liverpool address for the period 9 March 2015 to 18 October 2015. the Tribunal does not find that the electricity bill or payslips in and of themselves constitute compelling evidence that the applicant and the sponsor lived at the same address.
24. The applicant and sponsor provided limited evidence regarding the financial aspects of their relationship, including evidence of any pooling of financial resources, sharing of day-to-day expenses or shared financial commitments for their life together as spouses.
25. The parties have no joint liabilities or major assets together. There is limited evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is little evidence before the Tribunal to support that the parties share day-to-day living expenses or pool their financial resources.
26. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds

based on the evidence before it, that the sponsor has provided significant financial support to the applicant. The Tribunal places limited weight on this aspect of the relationship.

27. Nature of the household

28. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, if any, living arrangements of the parties and the sharing of the responsibility for housework.
29. The Tribunal queried the sponsor and applicant as to their past and present living arrangements. The sponsor responded that she is living with her parents at Cabramatta and the applicant responded that he is currently living with his parents and siblings in Lebanon. The parties gave evidence that when they are living together, they share the responsibilities of the household equally. The sponsor and applicant provided broadly consistent and detailed oral evidence of their activities and living arrangements when they were together in Lebanon and of the sharing of household duties and responsibilities when they lived together in Australia. Their evidence was also supported by statements made by family and friends.
30. The sponsor gave evidence that she has travelled to Lebanon on three occasions with the most recent being from 8 October 2019 to 5 November 2019. The sponsor stated that the parties had cohabited at the applicant's family home in Lebanon and that they shared the household responsibilities such as shopping, cooking, cleaning and washing in Lebanon. The parties provided photographic evidence of residing together in Australia and Lebanon in a home environment. The Tribunal found the sponsor to be genuine and her evidence persuasive. The Tribunal initially queried why there was limited photographic evidence provided at the time of application. The sponsor through her agent responded that they had forwarded significant photographic evidence and it must have been lost. The three witnesses at the hearing provided a significant amount of photographic evidence that was stored in their mobile phones showing the couple in a home situation and living together.
31. As previously stated, (para 21) the parties provided a copy of a Lumo Energy electricity bill in the applicant's name for the Liverpool address for the period 22 May 2015 to 21 August 2015. The sponsor provided copies of her payslips addressed to her at the Liverpool address for the period 9 March 2015 to 18 October 2015. The Tribunal does not find that the electricity bill or payslips in and of themselves constitute compelling evidence that the applicant and the sponsor lived at the same address. The Tribunal found the three witnesses' evidence as to the parties' living arrangements persuasive and credible.
32. Based on the limited evidence above, the Tribunal is satisfied that the applicant and sponsor have resided together as spouses or that they have future plans to reside together as spouses in Australia.
33. Based on the evidence presented by the parties, the Tribunal accepts that they live together and have established a joint household together and that they share the responsibility for the housework when the sponsor visits the applicant in Lebanon and previously when living together in Australia. The Tribunal places some positive weight on this aspect of the relationship.

34. Social aspects

35. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.

36. The parties provided a significant amount of photographic evidence stored in mobile phones of their wedding reception, photos taken of themselves with each other and family and friends in many social settings and significant events in Australia and Lebanon. The photos indicate that the applicant and the sponsor have undertaken many joint social activities, have been in the company of each other and have travelled together in Lebanon and Australia. The Tribunal has given significant weight to the submitted photographs as evidence of the social aspects of the claimed relationship. The parties provided an additional 19 statutory declarations (Form 888) to the Tribunal. Some of those declarations give little insight into the inception and development of the relationship as they only attest to knowing about the relationship and have known the parties for a short period of time, other statutory declarations have a sound knowledge of the relationship and give a strong insight into the inception and the development of the relationship as they have known the parties for a lengthy period of time. The Tribunal places significant weight on those statutory declarations.
37. Overall, the Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

38. Commitment

39. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
40. The applicant and sponsor claim to have been introduced to each other through family friends in Australia. They first met in person on 10 May 2013 and instantly liked each other. They committed to a shared life on 2 June 2013, and they got engaged on 6 July 2013. They got married religiously on 12 July 2013 and celebrated their wedding on 7 December 2013. They have provided a copy of their marriage certificate registered in Australia in July 2013. The Tribunal accepts the parties are lawfully married and have been in a relationship for over eight years.
41. The sponsor gave evidence that she has never felt a connection with anyone as much as she does with the applicant. The sponsor has travelled to Lebanon on three occasions and would have travelled more often if it was not for COVID-19 and that fact that her brother (deceased) was seriously ill and she had to donate bone marrow to him. The parties stated that they have maintained daily contact during their long separation and supported each other providing comfort and care to each other during family tragedies. The sponsor states that she supports the applicant financially and would not do so if the relationship wasn't genuine. She gave evidence that she does not want to continue with frequent travel to Lebanon due to the danger she has previously encountered on her travels there and living apart from her husband for a lengthy period of time has been frustrating and stressful because they wish to start a family and live as a family unit in their own home in Australia. The sponsor gave evidence that she has sourced employment opportunities for the applicant in the trucking industry through family members and he wants to be gainfully employed and work on a full-time basis to support his future family.
42. The parties presented documentary evidence of continued daily contact during periods of separation and a sound knowledge of each other's lives, family, living arrangements, health issues, personal history and future together. The evidence of communication between the parties is significant and the Tribunal considers the parties' knowledge of one another and their everyday concerns is a function of this communication. The parties also provided

individual statements attesting to the genuineness of their relationship and their belief of it being a long-term one.

43. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and genuine.
44. The Tribunal is satisfied the applicant and the sponsor provide each other with a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
45. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.

46. Findings

47. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
48. Given these findings, the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore, the visa applicant meets cl.309.211(2) and cl.309.221.
49. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor at the time of the visa application was an Australian citizen who had turned 18. Therefore, the applicant meets cl.309.212 and cl.309.213.
50. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

51. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).